No. 82-1690

In the Supreme Court of the United States

OCTOBER TERM, 1982

J. C. LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly refused to instruct the jury that intent to deceive or defraud is an element of either 18 U.S.C. 287 or 18 U.S.C. 1001.

2. Whether the district judge correctly refused to recuse himself from the case after permitting petitioner to withdraw his guilty plea.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1983. A petition for rehearing was denied on March 16, 1983. The petition for a writ of certiorari was filed on April 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

. Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of submitting a false claim to the United States Army Corps of Engineers, in violation of 18 U.S.C. 287, and on one count of making false statements to the same

agency, in violation of 18 U.S.C. 1001. He was sentenced to concurrent one-year terms on each count. The court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence adduced at trial showed that petitioner owned and operated Central Electric Time, Inc., a corporation specializing in fire detection and alarm systems. In December 1976, Central Electric submitted a proposal to the United States Army Corps of Engineers to supply smoke detectors for use in a military dormitory. The proposal represented that Central Electric would supply Model PID-B smoke detectors and that the detectors were listed with Underwriters Laboratories (UL-listed). The proposal also indicated that Central Electric was the manufacturer of the detectors. The Corps of Engineers approved the proposal (1 Tr. 99-103; 2 Tr. 626-627, 629-630).

Contrary to the proposal, however, petitioner supplied Model PID-3B smoke detectors instead of the PID-B detectors that had been agreed to. The PID-3B model did not conform to the specifications in the proposal. First, the PID-3B model was manufactured by a South Korean firm rather than by Central Electric. In addition, they were less expensive and of poorer quality than the PID-B model. Finally, the PID-3B detectors were not UL-listed (1 Tr. 279, 384-403; 2 Tr. 633-634, 655-657). Petitioner caused to be placed on each of the detectors two labels that read "Central Electric Time, Inc., manufacturer of UL listed alarm devices" and "Model PID-3B, UL, File # S-1383" (1 Tr. 222; 2 Tr. 664, 690, 726, 735-736). Petitioner then submitted claims for the PID-3B smoke detectors at the contract price for the PID-B detectors (1 Tr. 166-168); petitioner's cost for the PID-3B detectors was $7,387, while his cost for the PID-B detectors would have been $16,460 (Pet. App. 2a n.1).

2. During the conference on jury instructions, petitioner contended that the government was required to prove intent to deceive or defraud under both 18 U.S.C. 287 and 1001 (2 Tr. 864-865). The district court ruled, however, that "[t]he requisite mental state for guilt under Section 1001 and under Section 287 of the Criminal Code is that the Defendant acts knowingly, that he act knowing the falsities of the representations and that his conduct is intentional or deliberate in the sense that he did not act out of mistake or ignorance or other innocent reason" (2 Tr. 862). The court instructed the jury in accordance with that ruling (2 Tr. 933-935).

3. Several months before the trial, petitioner had pleaded guilty to count one of the indictment charging him with making false statements (PH Tr. 1-14).[1] A month later petitioner filed a motion to withdraw the plea, claiming he did not "realiz[e] the difference between fraud and honest mistake" and had been "confused" and "pressured" (WH Tr. 4-5). The district court, although concerned that it was being manipulated by petitioner following his review of the presentence report (*id.* at 41-42), granted the motion on the condition the government could reconstruct its case. The court added (*id.* at 47):

> In view of the comments that I have made, Mr. Metnick, you and your client should discuss whether you would like to ask me to recuse myself, I would be perfectly willing to if you wish to recuse myself since I have expressed attitudes towards Mr. Lee's sudden change of plea as being a possible manipulation with

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[1] "PH Tr." refers to the transcript of the plea hearing. "WH Tr." refers to the transcript of the hearing on petitioner's Motion to Withdraw Guilty Plea. "RH Tr." refers to the transcript of the hearing on petitioner's Renewed Motion to Recuse.

> the judicial system, and if you want me to, I will, and you can ask Judge Ackerman, and I won't be personally offended.

Subsequently, petitioner filed a motion to recuse. After a conference call with the parties, the district judge granted the motion and transmitted the case file to the chief judge of the court for reassignment. However, the chief judge ordered that the case be returned to the original district judge. The chief judge noted that the motion to recuse failed to allege any ground for recusal other than the district judge's offer to recuse himself, and that the judge's impartiality was shown by his grant of petitioner's motion to withdraw the guilty plea (Pet. App. 7a-8a).

Petitioner then filed a renewed motion to recuse. After a brief hearing, the district judge denied the motion (R H Tr. 1-7). The judge explained that he had "no personal bias or prejudice against" petitioner (*id.* at 5) and recounted (*ibid.*):

> [Chief] Judge Morgan called me up and asked me, and I said no, it is the lawyers. If they were uncomfortable I would let them go elsewhere. He said, "Well, we can't be shipping the cases around the district that way." He said, "I will send it back unless you have feelings against Mr. Lee." I said, "I have no feelings against Mr. Lee. Send it back."

4. The court of appeals affirmed the convictions (Pet. App. 11a). Agreeing with the district court, it held that intent to deceive or defraud is not an element of either 18 U.S.C. 287 or 18 U.S.C. 1001 (Pet. App. 3a-5a). The court also held that the district judge correctly refused to recuse himself, noting both the absence of "actual or even apparent prejudice" against petitioner in his handling of the case and the fact that the alleged bias was not a ground for recusal because it was attributable to knowledge gained by the judge from his participation in the case (*id.* at 8a-9a).

ARGUMENT

1. Petitioner contends (Pet. 7-8) that there is a conflict among the circuits on the intent requirement of 18 U.S.C. 287.[2] But the courts that have specifically considered the question whether intent to deceive or defraud is an element of the offense under Section 287 have uniformly held, consistent with the decision below, that no such intent is required when the defendant is charged with making false, as opposed to fraudulent, claims. See *United States* v. *Blecker*, 657 F.2d 629, 634 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982); *United States* v. *Irwin*, 654 F.2d 671, 683 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Milton*, 602 F.2d 231, 233-234 (9th Cir. 1979); *United States* v. *Maher*, 582 F.2d 842, 847-848 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979). Furthermore, the decisions cited by petitioner to demonstrate the existence of a conflict arose under the False Claims Act (31 U.S.C. 231) rather than under 18 U.S.C. 287;[3] however, as the court

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[2]18 U.S.C. 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[3]See *United States* v. *Mead*, 426 F.2d 118 (9th Cir. 1970); *United States* v. *Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966); *United States* v. *Ueber*, 299 F.2d 310 (6th Cir. 1962). The False Claims Act provides in part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * * shall forfeit

explained in *United States* v. *Maher, supra,* 582 F.2d at 848 (footnote omitted), "[t]he nature of the proceedings, the standards of proof, and the defendant's interests at stake are wholly different under [18 U.S.C. 287 and 31 U.S.C. 231], and in construing § 287 we do not find either authority or persuasion in defendant's analogy to § 231." Accord: *United States* v. *Milton, supra,* 602 F.2d at 233-234.

Petitioner also contends (Pet. 7-8) that the decisions in this and other cases on the intent requirement of 18 U.S.C. 1001 conflict with the Fifth Circuit's decision in *United States* v. *Lange,* 528 F.2d 1280 (1976).[4] Petitioner's contention presents no conflict that warrants this Court's review, however.[5]

To be sure, the opinion in *Lange* contains language to the effect "that the word 'false' as used in § 1001 must mean more than simply incorrect or untrue. An intent to deceive

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and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

31 U.S.C. 231.

[4]18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[5]Moreover, it is unnecessary for the Court to consider petitioner's claim under 18 U.S.C. 1001 in light of the validity of his conviction for the Section 287 offense and the fact that he received concurrent sentences on the two counts. See, *e.g., Barnes* v. *United States,* 412 U.S. 837, 848 n.16 (1973).

or mislead is required under the act" (528 F.2d at 1286 n.10). On this basis the court included "specific intent" as one of the elements of the offense under Section 1001 (528 F.2d at 1287).

However, the Fifth Circuit has since affirmed a conviction based on instructions that the intent requirement in Section 1001 " 'means the statement must have been made voluntarily, deliberately, and intentionally, and with knowledge of its contents and falsity of its contents as distinguished from the making of a false statement by inadvertence, mistake, carelessness or for any other innocent reason' " (*United States* v. *Evans*, 559 F.2d 244, 246 (1977), cert. denied, 434 U.S. 1015, 435 U.S. 945 (1978)). That instruction is not materially different from the district court's ruling in this case that Section 1001 requires "that the [d]efendant acts knowingly, that he act knowing the falsities of the representations and that his conduct is intentional or deliberate in the sense that he did not act out of mistake or ignorance or other innocent reason" (see page 3, *supra*). Moreover, the holding below that the intent requirement of Section 1001 is knowledge of the falsity of the statement accords with other Fifth Circuit cases. See, *e.g.*, *United States* v. *Smith*, 523 F.2d 771, 774 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *McClanahan* v. *United States*, 230 F.2d 919, 924 (5th Cir.), cert. denied, 352 U.S. 824 (1956); *McBride* v. *United States*, 225 F.2d 249, 253-255 (5th Cir. 1955), cert. denied, 350 U.S. 934 (1956). Thus, at most, petitioner has raised a conflict within the Fifth Circuit that does not call for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[6]

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[6]We also note that the decision below is consistent with the law of the only other circuit that has decided the issue. See *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981); see also *United States* v. *Weatherspoon*, 581 F.2d 595, 601 (7th Cir. 1978).

2. Petitioner argues (Pet. 10-11) that the district judge erred in failing to recuse himself from the case on the ground that the granting of the first motion to recuse demonstrates that the judge harbored prejudice against petitioner. The court of appeals correctly decided this fact-bound issue (Pet. App. 5a-9a), and further review is unwarranted.

It is clear that the district judge granted the original recusal motion only because he believed his comment about suspected manipulation of the court might be misconstrued (WH Tr. 47; RH Tr. 4-6). That the court sought to act out of an abundance of caution does not estop it from reconsidering the matter or bar it from further involvement in the case.

Moreover, the district judge's initial comment plainly was based on his observations at pretrial proceedings and therefore constitutes no basis for recusal. It is well established that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); see also *United States* v. *Baskes*, 687 F.2d 165, 170-171 (7th Cir. 1981); *United States* v. *English*, 501 F.2d 1254, 1263 (7th Cir. 1974), cert. denied, 419 U.S. 1114 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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